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**In the Supreme Court of the United States**

OCTOBER TERM, 1987

JAMES H. WEBB, JR.,  
SECRETARY OF THE NAVY, PETITIONER

v.

CARMELO MALDONADO

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

CHARLES FRIED  
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*Department of Justice*  
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Supreme Court, U.S.  
**FILED**

**IOV 20 1987**

JOSEPH F. SPANIOLO, JR.  
CLERK

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Respondent devotes the bulk of his brief in opposition (Br. in Opp. 11-21) to a discussion of the merits of the question presented by the petition. One point respondent has raised, however, merits a brief reply.

Respondent concedes that the Ninth Circuit's decision in this case squarely conflicts with the District of Columbia Circuit's decision in *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (1984), cert. denied, 472 U.S. 1021 (1985). Respondent contends (Br. in Opp. 5-11), however, that the Court should deny the petition in this case because the District of Columbia Circuit has granted rehearing en banc in *Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43 (1987), in order to decide whether *Laffey* should be reconsidered. Respondent suggests that the petition in this case should be denied in order to allow the D.C. Circuit to rehear its decision in the *Cumberland Mountains* case. That argument is unpersuasive, for three reasons.

First, the District of Columbia Circuit has recently decided to hold the *Cumberland Mountains* case in abeyance pending this Court's resolution of this petition. Br. in Opp. App. 3a-4a (reprinting the D.C. Circuit's November 5, 1987, order in the *Cumberland Mountains* case).<sup>1</sup> Thus, the conflict between the Ninth Circuit's decision in this case and the D.C. Circuit's decision in *Laffey* is still present and should be resolved by this Court. Respondent's invitation to play Alphonse and Gaston with the D.C. Circuit should be declined.

Second, the District of Columbia Circuit appears to believe that the question presented in the *Cumberland Mountains* case differs from the question presented in this case. In the order holding the *Cumberland Mountains* case in abeyance, that court stated that any further briefing in that case would be addressed to the question whether an attorney's customary billing rate should be used to calculate a reasonable attorney's fee when counsel "customarily charges below the prevailing community rate in order to serve a particular type of client" (Br. in Opp. App. 4a). This case does not involve that claim. Here, respondent's counsel had the same customary hourly billing rate for every type of client and legal work that he performed (Pet. 4-5). For that reason, a decision by the D.C.

<sup>1</sup> The District of Columbia Circuit granted rehearing en banc in the *Cumberland Mountains* case without asking the government for a response to the en banc suggestion. Once the government learned of the court's order, we brought to the court's attention the pending petition in this case, and we asked the court to reconsider its decision to rehear the case en banc, or to hold that case in abeyance pending this Court's disposition of the petition in this case. On November 5, 1987, the D.C. Circuit entered an order denying our motion for reconsideration, but holding the *Cumberland Mountains* case in abeyance pending this Court's disposition of the petition in this case. Br. in Opp. App. 3a-4a.

Circuit in the *Cumberland Mountains* case appears unlikely to resolve the question presented by this case.<sup>2</sup>

Third, any dispute among the panel members in the *Cumberland Mountains* case on the question whether the D.C. Circuit's earlier decision in *Laffey* is correct hinges on the proper interpretation of this Court's decision in *Blum v. Stenson*, 465 U.S. 886 (1984), and the application of *Blum* to a case in which counsel has an established hourly billing rate. An authoritative construction of *Blum*'s application to such facts is necessary and can only be provided by this Court.

In sum, the District of Columbia Circuit's actions in the *Cumberland Mountains* case provide no basis for denying the petition here.

For the foregoing reasons and those given in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED  
Solicitor General

NOVEMBER 1987

<sup>2</sup> We contemplate addressing in our brief on the merits in this case, however, the question raised by the District of Columbia Circuit in the *Cumberland Mountains* case.